IN THE

Supreme Court of the United States

October Term, 1978

No. 78- 672

ALEXIS I. DUPONT SCHOOL DISTRICT,
CLAYMONT SCHOOL DISTRICT,
CONRAD SCHOOL DISTRICT,
MARSHALLTON-McKEAN SCHOOL DISTRICT,
NEWARK SCHOOL DISTRICT,
NEW CASTLE-GUNNING BEDFORD SCHOOL DISTRICT
and STANTON SCHOOL DISTRICT,

Petitioners,

v.

BRENDA EVANS, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Gunning Bedford School District,
and Stanton School District.

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Petitioners, Alexis I. duPont School District, Claymont School District, Conrad School District, Marshallton-

McKean School District, Newark School District, New Castle-Gunning Bedford School District, and Stanton School District, respectfully request that a Writ of Certiorari issue from this Court to review the judgment of the United States Court of Appeals for the Third Circuit (hereinafter "Third Circuit") in cause numbers 77-2337 and 78-743-48. Petitioners are seven of the suburban school districts that have been dissolved by the final order on remedy entered by the United States District Court for the District of Delaware on January 9, 1978 (as modified by further order of the court on January 20, 1978). The court's order provides for the survival of the dissolved districts, for the limited and sole purpose of pursuing rights of appeals or judicial review. *Evans v. Buchanan*, 447 F. Supp. 982, 1039 (D. Del. 1978), A228-229.

OPINIONS BELOW.

The opinion of July 24, 1978, of the Court of Appeals for the Third Circuit is not yet reported. It is set out in the Appendix to the Petition for Writ of Certiorari filed by Delaware State Board of Education which is being filed concurrently herewith at pages A1 to A62. An en banc opinion of the Court of Appeals for the Third Circuit of May 18, 1977 (three judges dissenting) is reported at 555 F. 2d 373, *cert. denied*, 434 U. S. 880 (1977) (three justices dissenting).

The opinion of the United States District Court for the District of Delaware which accompanied its final order upon remedy in this case, and which was affirmed by the Court of Appeals for the Third Circuit in its opinion of July 24, 1978, is reported at 447 F. Supp. 982 (1978) and appears in the same Appendix at pages A98 to A212. An earlier opinion of the District Court of August 5, 1977,

which was also before the Court of Appeals, is found at pages A63 to A97. Three other opinions of the United States District Court for the District of Delaware which are pertinent to this petition are those of a three-judge court reported respectively at 416 F. Supp. 328 (1976) (one judge dissenting), 393 F. Supp. 428 (1975) (one judge dissenting) and 379 F. Supp. 1218 (1974) (one judge concurring and dissenting). The interlocutory injunctive order entered by the three-judge court on April 16, 1975 following that court's 1975 opinion (reported at 393 F. Supp. 428) was summarily affirmed by this Court without opinion, *Buchanan v. Evans*, 423 U. S. 963 (1975) (three justices dissenting).

JURISDICTION.

The opinion of the United States Court of Appeals was filed on July 24, 1978. This Court's jurisdiction is invoked pursuant to 28 U. S. C. § 1254.

QUESTIONS PRESENTED.

1. Whether the standards enunciated by this Court in *Dayton Board of Education v. Brinkman* are applicable to:

(A) Cases in which de jure school segregation was required by state law at the time of *Brown I;*

(B) Cases wherein a system-wide violation has been found.

2. Whether, in determining the question of continuing segregative effect in an inter-district case involving several separate and independent school districts, the *Keyes* presumptions are applicable:

(A) To acts of non-school authorities such as FHA officials, state real estate commissions, public housing authorities, local officials authorized to receive the recording of deeds and the like.

(B) To acts of school authorities of other independent and separate school district.

(C) To cases wherein it is conceded that the proposed remedy does not purport to comply with the "but for" standard.

4. Whether a school desegregation remedy may be imposed for acts of school or non-school public officials in the absence of a finding that such acts were accompanied with discriminatory intent and without a determination of the continuing segregative effect, if any, flowing from each such act.

5. Whether voluntary programs involving majority to minority transfers between independent and separate school districts may be an appropriate remedy in a metropolitan multi-district school desegregation case.

6. Where an appellate court concludes that it would be speculative to determine whether a prior summary affirmance by the Supreme Court in the same litigation affirmed only one or all substantive findings of a three-judge court, whether:

(A) It is appropriate for the lower courts to assume that all substantive findings were affirmed.

(B) It is appropriate for the lower courts to refuse to determine which, if any, of the substantive findings were necessarily affirmed by the Supreme Court.

STATEMENT OF THE CASE.

This petition brings to this Court, for the first time, a metropolitan school desegregation case involving a multiple number of separate school districts, i.e., eleven in number, wherein all issues, liability and remedy, are ripe for consideration by this Court. Absent a review by this Court, the case is ended and will inevitably serve as a precedent for other cases now progressing through the federal judicial system and for those which will certainly be filed as an aftermath of this litigation.

The final judgment of the District Court of January 9, 1978 (as modified by the order of January 20, 1978) was affirmed by the Third Circuit Court of Appeals on July 24, 1978. The order (A213-233) provides for a detailed and sweeping school desegregation remedy which, *inter alia*:

1. Dissolved eleven separate political entities. Nine of these entities, including the seven petitioners, had been found by the courts below to have operated separate, independent and *unitary* school systems since the 1950's and one other since the 1960's.

2. Merged eleven of the twelve separate school systems in New Castle County (ten of which had been found to be unitary) into a single countywide school system contrary to Delaware's traditional educational policy of small districts.

3. Directed a pupil assignment plan which will affect all students in northern New Castle County and who comprise in excess of 60% of all of the public school students of the State of Delaware. The plan achieves a racial balance in each and every school in all of the former eleven districts mirroring the racial balance of the total area involved (northern New

Castle County) without regard to the remedial standards enunciated by this Court.

4. Disenfranchised the voters of nine of eleven districts in school affairs until 1984 and terminated the tenure of board members of the other two districts who had been duly appointed pursuant to Delaware statutory law.

5. Required a substantial increase in local tax rates in the former suburban districts.

The threshold question before this Court is whether the Wilmington school case, which is fraught with error at every level of the proceedings, should be permitted to serve as a bellweather for other multi-district metropolitan school cases without review by this Court.

Because of the national importance of this case which transcends its vital importance to the people of the State of Delaware and its most populous county of New Castle, it is important, even at the petition stage of these proceedings, to be clear and thorough with respect to the history of the litigation and to summarize the relevant facts which are supported by the record as distinguished from "facts" which have become part of the mythology of this case through judicial repetition despite the lack of any support in the record. Regrettably, the long and confusing history of the Wilmington phase of the case and the lack of a definitive appellate opinion following a review of the basic findings of the three judge court as they appear in the first two decisions of that court,[1] has led to confusion, oversimplification and repetitive error which have become part of the predicate upon which the remedy has been designed.

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1. *Evans v. Buchanan*, 379 F. Supp. 1218 (D. Del. 1974); *Evans v. Buchanan*, 393 F. Supp. 428 (D. Del. 1975).

1. It is not accurate to state that this case has been pending in the federal courts since 1957 or that the State of Delaware has "dragged its heels" on the Wilmington issue for twenty-six years (A8, 27, 31). In 1957, this case involved only some of the rural school districts in Kent and Sussex Counties. In that year, a judgment was entered directing the State Board of Education to submit a plan for education on a racially nondiscriminatory basis in all districts in the State which had not already desegregated their schools.[2] Wilmington had already desegregated its schools, as that term was understood in 1957, and no contention about Wilmington was made in this case until 1971. The suburban school districts of New Castle County also desegregated their schools in the 1950's and the District Court has recognized throughout the current proceedings that the suburban school districts of New Castle County have been unitary districts since shortly after *Brown*. As far back as 1960, the Court of Appeals for the Third Circuit observed that the State of Delaware had already "integrated many of its schools, *particularly in the Wilmington Metropolitan area*". (Emphasis supplied). *Evans v. Ennis*, 281 F. 2d 385 at 393 (3d Cir. 1960). Most of the desegregation area involved in this case is generally considered to be the Wilmington metropolitan area. A judgment was entered in 1961 which approved a statewide plan of desegregation which included the continuance of Wilmington's historic school boundaries.[3] Six years later, in 1967, HEW pointed to Delaware as the first border state which "had completely eradicated the dual school system".[4]

2. *Evans v. Buchanan*, 152 F. Supp. 886, 889 (D. Del. 1957).

3. *Evans v. Buchanan*, 195 F. Supp. 321 (D. Del. 1961); 379 F. Supp. 1218 (D. Del. 1974) at 1221, fn. 2.

4. *Evans v. Buchanan*, 393 F. Supp. 428 (D. Del. 1975) at 451.

2. In 1971, the plaintiffs asserted for the first time that a dual school system existed in the City of Wilmington. Placed in proper perspective, this case involving the Wilmington School System was initiated at that time and was expanded so as to include the ten separate unitary districts in 1974. It has not lingered for twenty six years as has been asserted by the court below.

3. The three-judge court's opinion of July 12, 1974, decided before *Milliken v. Bradley*, 418 U. S. 717 (1974) (*"Milliken I"*), held that segregated schooling *in Wilmington* had never been eliminated and that the vestiges of a dual school system still existed *in Wilmington* which needed to be eliminated.[5] The "racially identifiable schools" that concerned the court and which were to be desegregated were *in Wilmington only*. Addressing itself to the question of remedy, the court observed that the "central issue" was whether an effective remedy for the dismantling of the remains of Wilmington's dual school system could be "found within the existing boundaries of the Wilmington School District" or whether "other areas of New Castle County" would have to be incorporated for that purpose (page 1224).

4. Following *Milliken I*, it became apparent with respect to the "central issue", that "other areas of New Castle County" could be incorporated for the purpose of dismantling the Wilmington dual school system only if inter-district violations were first established. The three-judge court then undertook to find such inter-district violations in its opinion of March 27,

5. *Evans v. Buchanan*, 379 F. Supp. 1218 (D. Del. 1974) at 1223.

1975,[6] from which the author of the first opinion dissented. The 1975 opinion makes clear that the dual school system that was to be dismantled and the racially identifiable schools that were to be eliminated were located in the Wilmington School District and not throughout all of northern New Castle County. The question remained, following the court's opinion, whether the required remedy could be accomplished within the Wilmington School District or whether other areas of the County would be required. That the three-judge court was not undertaking to dismantle the remains of dual school systems in the suburban districts of northern New Castle County, but only within the Wilmington School District, appears from a careful reading of that opinion and, particularly, pages 430,[7] 438,[8] 442[9] and 446.[10] The dissenting opinion of Judge Layton, the author of the 1974 opinion, also makes clear that the dual school system to be dismantled was that of the Wilmington

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6. *Evans v. Buchanan*, 393 F. Supp. 428 (D. Del. 1975).

7. The 1974 opinion was acknowledged to have found that "the dual school system in Wilmington had not been eliminated" because many pre-*Brown* black schools remained identifiably black in the Wilmington School District.

8. The Court acknowledged that it had held in its 1974 opinion that "core" black schools in Wilmington have remained segregated black schools and most of Wilmington's schools had become identifiably black and that the forthcoming remedy was to eliminate Wilmington's identifiably black schools.

9. The 1974 opinion had held that, at the time of the Educational Advancement Act of 1968, the State Board of Education had not eliminated "the vestiges of de jure segregation in the *Wilmington schools.*" (Emphasis supplied).

10. The Court stated that "the victims of the discrimination are the school children of *Wilmington*" (emphasis supplied) and observed that the victims were to be restored "to the position they would have occupied in the absence of such conduct."

school district.[11] Although the three-judge court concluded that the predicate for possible inter-district relief had been found, it continued to be uncertain as to whether the vestiges found in Wilmington could be eliminated by a Wilmington only remedy or whether it would be necessary to incorporate "other areas of New Castle County", as yet unspecified and unidentified (pages 446, fn. 37 and 447). If the three-judge court had found "a pervasive de jure segregation throughout Wilmington and the *named Northern New Castle County school districts*" (Opinion of Court of Appeals, A25, emphasis supplied) or that there was "remaining segregation that prevailed through the schools of Northern New Castle County" (A26), it could not have considered the possibility that a Wilmington only plan might work. Clearly, it had found *only* that vestiges of a dual school system existed in the Wilmington School District.

5. An appeal was taken directly to this Court from the interlocutory injunctive order entered by the three-judge court following the issuance of its 1975 opinion which enjoined the State Board of Education and other parties, including the petitioning suburban school districts, to submit intra-district and inter-district plans to remedy the vestiges of segregation found by the court to exist within the Wilmington School District. This order was summarily affirmed without opinion, *Buchanan v. Evans*, 423 U. S. 963 (1975), Justices Rehnquist and Powell and Chief Justice

11. At p. 448, Judge Layton referred to the Court's earlier "finding that Wilmington's schools retain vestiges of the former dual system" and at p. 450 stated that: "The only duty owed Plaintiffs, as I see it, was to see that the Wilmington district maintained a unitary school system (which it has not done—but the remedy for this has been set in motion by our July 12 opinion)."

Burger dissenting. The dissent expressed concern that this unexplained affirmance of the judgment of the District Court would create uncertainty for the parties and the lower court as to the effect of the affirmance. Regrettably, the dissent's prediction of uncertainty has proven true.[12]

6. Having determined, incorrectly we contend, that a sufficient predicate existed in this case for an inter-district remedy to dismantle the remains of a dual school system in the Wilmington School District, the three-judge court proceeded to hold hearings[13] of proposed Wilmington only and inter-district remedy plans. These hearings were held while the appeal to this Court was being processed. The three-judge court issued its May 19, 1976 opinion followed by its order of June 15, 1976.[14] At the outset, the court acknowledged that, in its prior opinions, it had "ruled that the segregation of the *Wilmington* schools was never erased" (emphasis supplied) and that *both* inter and intra-district remedies could be considered to remedy the condition (416 F. Supp. at 334). Consistent with its 1975 opinion, the court first considered whether a "Wilmington only" plan would suffice, a patently illogical exercise and waste of judicial time

12. Perhaps the best illustration of this is the conclusion of the majority judges of the Court of Appeals that it would be "a highly speculative exercise" to "determine which of the eight violations found by the District Court were affirmed or not affirmed by the District Court." *Evans v. Buchanan*, 555 F. 2d 373 (3d Cir. 1977) at p. 377.

13. At the Fall 1975 hearings, the parties were not "specifically" afforded "the opportunity of demonstrating whether the impact of the inter-district violation was limited" as suggested by the Court of Appeals (A9). Neither the three-judge court nor the parties had the benefit at that time of this Court's clear pronouncements on this subject which were to follow.

14. *Evans v. Buchanan*, 416 F. Supp. 328 (D. Del. 1976).

if the three-judge court was addressing itself to the elimination of the vestiges of a county-wide dual school system rather than of a Wilmington dual school system. (416 F. Supp. at 341-344).

7. In its 1976 opinion, the three-judge court did not reverse its previous findings that the suburban districts had been operating separate unitary school systems since the time of *Brown* nor did it reverse its previous finding that the dual school system to be dismantled was that of the Wilmington School District.[15] In considering a Wilmington only plan, the three-judge court stated at page 343:

> ". . . . We have already determined that the State had not fulfilled its mandate to operate a unitary school system . . ."

citing in fn. 56 on page 343, page 1223 of the 1974 opinion (379 F. Supp.), where the dual school system of Wilmington is specifically and expressly identified as the constitutionally suspect condition to be remedied. Significantly, in determining what "other areas" of New Castle County should be incorporated into the remedy, the three-judge court did not base its decision on the thesis that those areas had a dual school system which needed dismantling. The court had already ruled that all suburban districts were unitary districts. Rather, the court based its decision on which areas were needed to dismantle the vestiges of Wilmington's dual school system and simultaneously avoid the potential for white flight within the state in

15. This is not to say that, in its May 19, 1976 opinion, the three-judge court did not make passing references to the racial identifiability of the Wilmington and suburban school districts and their schools. However, the 1975 and 1976 opinions make it clear that the only dual system that existed was the Wilmington system and not the other ten unitary systems of the suburban districts.

so doing (416 F. Supp. at 353-355). In concluding its last opinion, the three-judge court stated at page 365:

> ". . . we have found a constitutional violation in the racially suspect treatment of *Wilmington* during a school district reorganization, and other actions in the past by the State and local authorities . . ." (emphasis supplied).

Thus, the only dual system that needed to be dismantled was that of the Wilmington School District.

8. An appeal was taken to the Court of Appeals for the Third Circuit from the June 15, 1976 final judgment of the three-judge court. The Court of Appeals, sitting en banc, concluded that it was precluded by this Court's previous summary affirmance from reviewing the violation issues of this litigation or from considering the application of this Court's subsequent decisions in *Washington v. Davis*, 426 U. S. 229 (1976) and its progeny and suggested that clarification of the violation issues could only be given by this Court. The majority held that this Court "affirmed the finding of one or more inter-district constitutional violations" and opined that it would be "a highly speculative exercise" to determine which of the eight violations [16] found by the District Court were affirmed or not affirmed by this Court.[17] By a four to three majority, the Court of Appeals affirmed with modification the basic concept of remedy that had been ordered by the District Court which, essentially, included all of northern New Castle County within its scope and required a mandatory reorganization of the

16. The eight "violations" are listed at 555 F. 2d at 384 and A22 fn. 11. See, also, the discussion, *infra*, at pp. 22-25.

17. *Evans v. Buchanan*, 555 F. 2d 373, 377-78 (3d Cir. 1977).

entire area. The majority directed the State Board of Education or other appropriate state authority to file a formal report with the District Court within sixty days and provided, further, for the appointment of a New Board if this was not done. (555 F. 2d. at 381).

9. The three dissenting judges on the Court of Appeals agreed that the question of constitutional violations and the effect of this Court's decisions in *Washington v. Davis, supra,* and *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U. S. 252 (1977) was "in the province of the Supreme Court and not in the Court of Appeals", observing that petitioners' argument in that regard "merits serious consideration." (555 F. 2d at 388-89.) The dissenters complained that the majority had failed to "specify which of the eight inter-district violations were to be remedied" and urged a remand "so that the continuing effects of any such inter-district violations can be assessed." The dissent expressed dismay as to how a Delaware official charged with desegregating the schools in accordance with the opinion of the Court of Appeals would know where to begin. (555 F. 2d at 383-386, 389-390.)

10. In June of 1977, following the action by the Third Circuit, this Court decided the cases of *Dayton Board of Education v. Brinkman,* 433 U. S. 406 (1977); *Brennan v. Armstrong,* 433 U. S. 672 (1977) and *School District of Omaha v. United States,* 433 U. S. 667 (1977).

11. The case returned to the District Court in accordance with the mandate and judgment of the Court of Appeals. Hearings were held in July of 1977 for the purpose of receiving the report of the

State Board of Education as required by the Court of Appeals and determining whether it complied with the opinion of the Court of Appeals.[18] The District Court concluded that the report of the State Board of Education was not in accordance with the opinion of the Court of Appeals and ordered the appointment of the New Board which was to develop a desegregation plan in accordance with that opinion.[19]

12. The October, 1977 hearings[20] were held to consider the plan developed by the New Board. It was conceded by the planners that no consideration had been given to the "but for" principle in the development of the plan and that its purpose was to achieve racial balance throughout the entire desegregation area without regard as to what the racial composition of the schools throughout the whole area would have been but for all or any one of the eight alleged constitutional violations.

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18. The assertion by the Court of Appeals in its July 24, 1978 opinion that appellants were afforded the opportunity at the July 1977 and October 1977 hearings to offer proof that some or all of the remaining segregation that prevailed through the schools of northern New Castle County was not the product of the substantial inter-district violation found by the three-judge court is inaccurate and clearly based upon a misunderstanding of the record. The July 1977 hearings were for the purpose of receiving the State Board of Education's report and the October 1977 hearings were for the purpose of receiving and considering the plans submitted by the New Board pursuant to court order and an alternate plan filed as a minority report by a member of the New Board. Neither of these hearings were for the purpose of making the *Dayton* findings although petitioners took the position throughout that the *Dayton* principles were applicable to this case. The District Court took the position that they were not applicable and that, in any event, the required *Dayton* findings had been made previously by the three-judge court—but without any citation to its opinions.

19. *Evans v. Buchanan*, 435 F. Supp. 832, 838-841, 848-849 (D. Del. 1977) (A63, 73-80, 94-97).

20. See fn. 18.

13. The District Court expressed dissatisfaction with the plan of the New Board (although it approved the grade concept approach espoused by the plan) and directed by court order that a special pupil assignment committee of the New Board develop a "9-3" grade center plan. The District Court entered its order of January 9, 1978 (subsequently modified on January 20, 1978, A213, 244) directing the implementation of a 9-3 plan which achieved racial balance throughout the entire northern New Castle County area, merging the eleven districts into one as of June 30, 1978, disenfranchising the voters of 9 of the 11 districts involved and discharging the publicly appointed officials of the other two districts, instituting ancillary relief and requiring a substantial increase in the local tax rates. The District Court conceded that its plan was not formulated in accordance with the "but for" standard of *Dayton*.[21]

14. Petitioners appealed, once again, to the Court of Appeals for the Third Circuit from the January 9, 1978 order. The order was affirmed. The three judges who dissented in 1977 on the ground, *inter alia*, that the inter-district violations had not been identified and the continuing effects thereof determined deferred to the majority on the grounds that the 1977 decision became "the law of the case and that institutional integrity requires respect for the rule previously announced by the majority." (A10, fn. 4). Thus, further confusion, error and misunderstanding had been engrafted into the case through judicial inertia.

15. The petitioners sought a stay from the Court of Appeals prior to the date of dissolution of the

21. *Evans v. Buchanan*, 447 F. Supp. 982, 1009 (D. Del. 1978) (A151).

eleven districts (June 30, 1978). The stay was denied, by order of the court of July 24, 1978. Accordingly, the petitioners and the other school districts of northern New Castle County, ceased to exist as operating units and were merged into a single "super district" more than three weeks before the opinion of the Court of Appeals was issued. A subsequent application for a limited stay made to this Court was denied, memorandum opinions having been written by Justices Brennan (September 1, 1978) and Rehnquist (September 8, 1978). *Buchanan v. Evans,* No. A-188.

REASONS FOR GRANTING THE WRIT.

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1. In This Landmark Multi-District Case, the Lower Courts Have Misinterpreted and Misapplied This Court's Decision in *Dayton*.

A. The Lower Court's Ruling That *Dayton* Does Not Apply to Cases Where There Has Been Past De Jure Segregation Mandated by State Law Is Erroneous, Establishes a Dangerous Precedent, and Should Be Reviewed.

The Court of Appeals has held that the standards prescribed by this Court in *Dayton* are inapplicable to the case at bar for the "base" reason that there is a distinction between de jure segregation previously mandated by state statute and de jure segregation caused by racially purposeful acts of school authorities (A30). No legal authority is cited for such a distinction and pure logic will not sustain it.

In the application of the *Dayton* standards, it should make no difference whether the segregative effects being dealt with were caused by deliberate and racially purposeful acts of school officials or whether they were required by statute.[22] Both involve intentional acts with the same results. *Dayton* requires that the continuing effects of de jure or purposeful segregation be determined and a remedy tailored to cure it. The distinction suggested, below, was simply not made in *Dayton*, would be punitive and inequitable and should not be permitted to stand as a precedent.

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22. See: *United States v. School District of Ferndale*, 557 F. 2d 1339, 1354 (6th Cir. 1978); *Keyes v. School District No. 1*, 413 U. S. 189, 198, 201 (1973).

B. The Courts Below Erroneously Treated This Case as a Pre-*Brown* Inter-District Dual System Mandated by State Law That Has Not Been Dismantled.

The courts below have treated this case as one in which there are continuing effects from a pre-*Brown* inter-district dual system mandated by state law. Yet, no findings have ever been made as to the extent of the continuing effects, if any, from this pre-1954 violation. The trial court's vague reference to "a historic arrangement for inter-district segregation within New Castle County" (393 F. Supp. at 447) or "historic pattern of inter-district segregation in northern New Castle County" (A22, fn. 11) has been accepted but never reviewed by the Court of Appeals. Upon examination, this arrangement or pattern is clearly insignificant.

The pre-1954 inter-district transfers were a part of the implementation of the state mandated dual school system prior to 1954. The following findings appear in the three-judge court's opinions:

> 1. In the 1954-55 school year, the last year of the inter-district transfer program, 845 suburban black children attended suburban schools and 191 suburban black children attended Wilmington district black schools. That is, approximately 18% of the suburban black children were transferred to Wilmington schools on an inter-district basis. (393 F. Supp. at 433).[23]
>
> 2. "Sometime after *Brown I*, this inter-district transfer program ceased, and the black children at-

23. The victims of this inter-district discrimination were the 191 black suburban children and not the black Wilmington children who have been found by the three-judge court to be the victims of the violations (393 F. Supp. at 446) and who were not included in the transfers.

tended school in the suburban districts where they resided." (393 F. Supp. at 433).[24]

3. "The 'withdrawal' of suburban children, both black and white, from the Wilmington School District, may have altered the racial balance of school attendance in Wilmington somewhat. . . . We do not find this 'withdrawal' of students to be significant inter-district segregation under *Milliken*" (393 F. Supp. at 434, fn. 8).

4. "Since the 1950's, Wilmington and the suburban school districts have operated independently of one another and the suburban districts have operated unitary schools for the children residing within their districts." (393 F. Supp. at 437, fn. 19).

The foregoing findings of the three-judge court conclusively demonstrate that the only historic "arrangement" or "pattern" involving any of the suburban school districts, or which was a part of a pre-*Brown* dual school system mandated by state law, the pre-*Brown* inter-district transfers, had no continuing effect on the racial composition of the schools following their termination shortly after *Brown I*.

This analysis puts at rest, as well, the inferences drawn by the respondents and the lower courts from the often quoted passage which is found in the three-judge court's 1975 opinion that, at the time of *Brown*:

". . . *de jure* segregation in New Castle County *was* a cooperative venture involving both city and suburbs. . . . At *that* time, in other words, Wilmington and suburban districts were not meaningfully 'separate

24. Thus, the only victims of this inter-district discrimination were restored to their rightful place many years ago.

and autonomous'". [393 F. Supp. at 437, emphasis supplied; See, also, A24].

Clearly, these statements of the three-judge court related to the condition that existed at the time of *Brown* or before *Brown* and not thereafter. They were mentioned as historic facts and not as continuing effects and are consistent with the observation of the Court of Appeals for the Third Circuit in 1960 that the State of Delaware had already "integrated many of its schools, *particularly in the Wilmington metropolitan area*", *Evans v. Ennis*, 281 F. 2d 385 at 393 (3d Cir. 1960) (emphasis supplied).

This case should not have been treated as a "disestablishment" case in an inter-district context. Whatever vestiges of a dual school system that existed in Wilmington as of 1974 could not have been caused by the pre-*Brown* inter-district transfers. Yet, this is a premise of the lower court's desegregation remedy in this case and the Court of Appeals was wrong in concluding that it was precluded from reviewing this and the other suggested violations by this Court's summary affirmance.

C. The Lower Courts' Refusal to Determine Which Constitutional Violations Were Necessarily Affirmed by This Court and the Effect of Such Violations Should Be Reviewed.

The parties and courts below have labored since November 1975 in the remedy stage of this litigation under a cloud of confusion and uncertainty as to which violations must be remedied.

The three-judge court's opinion of 1975 identified eight possible discrete constitutional violations but failed to make the necessary findings as to racial intent or continuing incremental segregative effect with respect to any of them. In 1977, the four judge majority of the Court of

Appeals refuted the position taken by the three dissenters that the lower courts should determine which of the eight possible violations were affirmed or not affirmed by this Court's summary affirmance because it would be "highly speculative" to do so and that the continuing effects of any inter-district violations found to have been affirmed by this Court should be assessed prior to the formulation of the remedy.[25] In the Court of Appeal's 1978 opinion, the three judges who had previously dissented proceeded on the basis that the majority opinion of 1977 was the law of the case and, accordingly, they spoke no further on these issues (A10, fn. 4). Thus, by cruel judicial fiat, the careful appellate scrutiny which this case demands has been denied. Instead, appellate pronouncements so unclear as to require resort to speculation have generated themselves into the law of the case.

The failure to make the required findings make a mockery of the pronouncement of the stated principles. If the violations had been identified and the continuing effects determined, as nearly as possible, the traditional judicial inquiry would have resulted in a remedy of appropriate nature and scope. It is indeed ironic that a judicial fear of speculation has resulted in a remedy which requires rank speculation in order to justify it.

There is fundamental legal error, lack of logic, and underlying unfairness for a court of appeals to recognize, as the Third Circuit did in 1977, that only one of eight possible constitutional violations may have been summarily affirmed, and to conclude in 1978 that "the combined *effect* of all" eight must be cured by the remedy (A25). Thus, the Court of Appeals has permitted a curious doctrine to control the remedy phase of this case. Where it would be "speculative" to determine what was decided by a summary affirmance of the Supreme Court, it must be

25. See, *supra*, pp. 13-14.

assumed that everything was affirmed and that the undetermined effect of all possible violations must be eradicated.

Should this Court grant certiorari in this case, petitioners will demonstrate that, if the lower courts had applied the *Dayton* standards in reviewing and analyzing the "findings" of the three-judge court as to the segregative effect of the three possible educational or school violations other than the pre-*Brown* inter-district transfers [26] they would have been compelled to exclude all of them. For example:

> (1) The three-judge court subsequently refused to hold the state subsidies for the inter-district transportation of students attending private schools to be unconstitutional. 416 Fed. Supp. at 364. Therefore, it could not be a violation.[27]
>
> (2) The establishment by the Wilmington School District of optional attendance zones was an *intra*-district policy unaccompanied by discriminatory intent. As to effect, the three-judge court concluded that "to some extent then, discriminatory school policies in Wilmington may have affected the relative racial balance" between Wilmington and the suburbs (393 F. Supp. at 436). The extent of the effect was undetermined and speculative.[28]
>
> (3) Referring to the effect of the Educational Advancement Act, the Court expressly stated:

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26. See, *supra*, pp. 19-21.

27. Illustrative of the confusion that has permeated this case is the fact that, in spite of the three-judge court's refusal to hold this "violation" unconstitutional, the Court of Appeals has identified it as one of the possible violations affirmed by this Court and to be remedied.

28. A further illustration of the confusion that exists in this case is that this intra-district violation was considered by the Court of Appeals to have been one of the inter-district violations affirmed by this Court and, therefore, to be remedied.

> "The record does not suggest that *but for* the statutory exclusion from its reorganization authority, the State Board would necessarily have consolidated Wilmington with any other district". 393 F. Supp. at 442, fn. 28. (Emphasis added).

Similarly, petitioners will be prepared to demonstrate that all of the remaining four housing violations lack specific findings of continuing incremental segregative effect when considered separately.[29] In discussing their effect, collectively, the three-judge court said that they were responsible "to a significant degree" for the growing disparity in the residential and school populations of Wilmington and the suburbs. 393 F. Supp. at 438.

Whether the "violations" are considered separately or in combination with each other, all of them are "relatively isolated" in the sense that the *Dayton* violations were isolated. This is particularly true of the four "educational" violations.[30] The segregative effect of these various "violations" were so nebulous and uncertain that the three-judge court, for the most part, had to consider them together and was able, only, to discuss the composite and collective effect of them in an unspecific manner. Further, the three-

29. The record was silent with respect to the racial population of residents of publicly assisted housing in Wilmington and the suburbs, 393 F. Supp. at 434, fn. 13, and no consideration was given to the number of public housing units that would have been constructed in the suburbs absent the unlawful conduct of the housing authorities. No specific finding was made by the three-judge court as to the effect of the recording of deeds containing racially restrictive covenants nor was there any specific finding as to the effect of the use of the FHA manual which was discontinued in 1949 or of the use of the Delaware Real Estate Commission handbook which included a reprint of the Code of Ethics of the National Association of Real Estate Boards.

30. I.e., the pre-*Brown* transfers, state subsidies for transportation of private school students, establishment of optional attendance zones by the Wilmington School District and the enactment of the Educational Advancement Act.

judge court conceded that other factors were involved in the racial disparity between the city and its suburbs including individual residential choice and economics. 393 F. Supp. at 435.[31]

The failure of the Court of Appeals to review or to insist that the District Court identify and analyze the violations that were necessarily affirmed by this Court and their effect was contrary to the standards required by this Court in *Dayton* and deprived petitioners the meaningful appellate review of this critical issue to which they, their constituents and the citizens of Delaware are entitled.

D. The Court Below Erred in Holding: (1) That *Dayton* Is Inapplicable Where a System-Wide Violation Exists; (2) That *Evans v. Buchanan* Presents a System-Wide Case.

1. *Dayton* Applies to a Case Involving a System-Wide Violation.

The courts below treat the Wilmington case as a "system-wide" case and conclude that this Court's *Dayton* decision is not applicable because of that. The courts are in error on both points.

It is true that this Court was faced with a case involving three "relatively isolated" violations "of questionable validity" at the time that *Dayton* was before it.[32] This

31. Given such recognition, it is particularly ironic that the pupil assignment plan adopted eliminates *all* racial disparity between city and suburban schools.

32. The *Dayton* case is now a system-wide case according to the latest opinion of the Sixth Circuit Court of Appeals. *Brinkman v. Gilligan (Dayton* IV) No. 78-3060 (July 27, 1978). The author of *Dayton* does not appear to note any significance in that fact, in that findings of incremental segregative effect and a remedy directed to the cure of that effect are still required. See Justice Rehnquist's memorandum opinion dated August 11, 1978, supporting his granting of an application for a stay in *Columbus Board of Education, et al. v. Gary L. Penick, et al.*, No. A-134. The

Court did not excuse a lower court dealing with a system-wide violation with system-wide impact from making the findings required by *Dayton*. They are equally as applicable. This Court's decisions in *School District of Omaha v. United States* and *Brennan v. Armstrong*, both of which were system-wide cases, underscore this fact.

The Court of Appeals' refusal to apply *Dayton's* standards to the case at bar on the ground that it is a system-wide case is contrary to this Court's holdings in *Dayton*, *Omaha* and *Brennan v. Armstrong*, and should be reviewed and not permitted to stand as a precedent in similar cases.

2. The Wilmington Case is Not a System-Wide Case.

The case at bar involves eleven separate school systems, not one. Since shortly after *Brown I*, nine of these districts (including the petitioners herein) have been found to have been operating separate unitary systems. Another district, DeLaWarr, has been found to have been doing the same since at least the 1960's. In only one of these eleven autonomous districts have vestiges of a dual school system been found by the three-judge court, i.e. the Wilmington School District. 379 F. Supp. 1218, 1223 (D. Del. 1974).[33]

The courts below do not explain how they move from a finding of ten separate unitary districts or school systems

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32. (Cont'd.)
Columbus case is another case involving a system-wide violation and impact and a de jure dual school system as of the time of *Brown I*.

33. In its 1977 majority opinion, the Third Circuit specifically referred at page 376 of its opinion and in paragraph 2 of its judgment which is found at page 381 of 555 F. 2d to page 1223 of 379 F. Supp. in identifying the dual school system which was to be eliminated. That dual school system was identified as that of the Wilmington School District.

in the suburbs and a single dual system in a separate city district to their sweeping conclusion that a single county-wide dual system exists and has existed for some twenty-six years. Nor does the Court of Appeals attempt to harmonize its conclusion with the observation of its predecessors in *Evans v. Ennis*, 281 F. 2d 385, 393 (3d Cir. 1960). The Court of Appeals and the single judge District Court that succeeded the three-judge court have assumed as a given fact in this case that such was the finding of the three-judge court. The findings of the three-judge court in this regard have been set forth at pp. 8-12 of this petition, and do not support these subsequent judicial pronouncements.

In understanding the erroneous results that flow from the lower court's predicate, it is well to heed the suggestion of Chief Justice Burger in *Milliken I*, disregarded by the courts below, that although the terms "unitary" and "dual" systems and "racially identifiable schools" have meaning within the context "of an established geographic and administrative school system populated by both Negro and white children" (i.e., a single district situation), such terms may not be as meaningful in other contexts such as a multi-district situation. *Milliken v. Bradley*, 418 U. S. 717 at 746.

II. The Imposition on the Defendants of the Burden of Proving That There Is No Incremental Segregative Effect Was Erroneous and Establishes a Dangerous Precedent.

The Court of Appeals placed the burden of proof on defendants to prove the absence of any incremental segregative effect. Aside from the fact that the court's holding is unique and not supported by any authority, including the three cited decisions of this Court, the stated premise of the court's ruling is incorrect in all respects.

The Court's ruling was based on five factors (A27):

1. There Was a Historical Pattern of Significant De Jure Segregation With Pervasive Inter-District Effects.

The Court of Appeals has applied the rules of *Keyes*, a violation case, to the issue of the determination of incremental segregative effect. The *Keyes* rules have been applied to the acts of school officials only and always in the context of a single district case. They have never been imposed on a school board for acts, albeit intentional acts, of *other* school boards or *non-school* public officials or agencies such as the FHA, state real estate commissions, public housing authorities, officers authorized to receive deeds for recording and the like.

In the context of "historical pattern", the only pre-*Brown* inter-district act that has been suggested which involved any of the petitioning suburban school districts or which was a part of a dual school system has long since ceased (see pp. 19-21, *supra*). Therefore, the "historical pattern" is an incorrect component of the court's premise for the imposition of the burden of proof in this case.

Moreover, even if the *Keyes* rules were applicable to the issue of incremental segregative effect, the housing and public housing "violations" would not support a presumption theory on this issue insofar as the school officials are concerned. Nor would the other educational "violations". Neither the Educational Advancement Act, the Wilmington School Board's intra-district optional attendance policies nor the state subsidies for the inter-district transportation of students attending private and parochial schools were found to have been accompanied with discriminatory intent and, therefore, would not support the *Keyes* presumptions. (*Supra*, pp. 22-25).

2. A Facially Reasonable Plan Was Prepared to Remedy the Effects.

The draftsmen of the court ordered plan conceded that the plans had been developed without regard to the "but for" principle or without consideration of the incremental segregative effect of any one or all of the alleged violations as did the District Court (A151). Accordingly, the plan ordered by the court cannot be described as "facially reasonable" and was, in fact, arbitrary, fanciful and unreasonable and not intended to meet the correct legal standards and criteria enunciated by this Court in *Dayton, Omaha* and *Brennan v. Armstrong.*

3. Defendants' Admission of Non-Feasibility.

The Court of Appeals has stated that "appellants [34] took the position that it was *impossible* for them to identify the precise vestigal conditions" (A26).

The statement to which the Court of Appeals apparently referred appeared in the Report of the State Board of Education Required by the Opinion and Order of the Circuit Court of Appeals of May 17, 1977. The statement was taken out of context in the briefing below and was misunderstood and adopted by the Court of Appeals without sufficient consideration of the full context. At page 37 of the cited report, immediately following the quoted sentence, the following sentence appears:

> "Certainly, there is no evidence in the *Evans v. Buchanan* litigation which would supply any help in making any such determination for decision. More than that, there is no information in any of the court's decisions in *Evans v. Buchanan* which would furnish

34. The petitioning suburban districts which have been dissolved by the federal court never took such a position and the Court of Appeals cites nothing in the record to support its statement with respect to them.

> any assistance in making any such decision or determination. In the absence of any assistance of that nature, the most anyone can be left with would seem to be an arbitrary determination and prediction."

To take one sentence or even one paragraph out of the text of a 100 page report is precarious at best. The excerpted sentence appears in a section of the report which followed a 22-page detailed analysis of the evidence in the trial record of the segregative effect of each discrete "violation". Since the Court of Appeals had left to speculation the question of which of the eight possible violations were to be dealt with, the State Board undertook to consider the actual discriminatory effect which each might have had upon black school children within the City of Wilmington.

The analysis demonstrated that, based upon the record evidence, it must be concluded that "some violations" had been rectified and cured and others supported a finding of minimal continuing effects, at most, flowing from them. In proper context, the Report concluded that, based upon the analysis of the trial record, it was not feasible to determine that the "but for" condition of the Wilmington school system and the student population in the "eleven affected districts" would be any different from the condition that prevailed at the time of trial.

The position of the petitioning suburban districts on this matter is substantially the same as that enunciated by Judge Garth of the Third Circuit in his dissent that, although not an easy determination to make, the Constitution and the decisions of this Court require that the violation be remedied and its segregative effect must be determined and "that the District Court could make a reasonably accurate assessment" if it undertook to do so (555 F. 2d at 390).

4. Defendant Is in the Best Position to Ascertain What the Pattern of Segregation Would Have Been "But for" the "Constitutional Violations".

The court asserts that the defendant is in the best position to make a "but for" determination (A27). We assume that the court refers to the State Board of Education rather than the defendant suburban school districts. Such an assertion without evidence or authority to support it is difficult to respond to. Regardless of what the State Board of Education's capabilities may be in this regard, and with due deference to the Court of Appeals, we would submit that expertise beyond the capabilities of the State and local educators would be required to make this determination with respect to some, if not all, of the "violations."

5. Defendant Has Dragged Its Heels for 26 Years.

This assertion [35] (A27) is at odds with the record and the various opinions of the lower courts in this case including the following:

1960—*Evans v. Ennis*, 281 F. 2d 385 (3d Cir. 1960) at 393: The Court of Appeals observed that the State of Delaware had already "integrated many of its schools, particularly in the Wilmington metropolitan area".

1961—The District Court approved a proposed new school code to be submitted to the General Assembly of the State of Delaware which approved essentially the same school district configuration in northern New Castle County which the Court of Appeals now says must be dismantled and did not provide for the consolidation of Wilmington into any other district.

35. The Court refers to "defendant" in the singular and obviously excludes the petitioning suburban school districts from its assertion.

Evans v. Buchanan, 195 F. Supp. 325 (D. Del.); 379 F. Supp. 1218 at 1221, fn. 2.

1967—HEW pointed to Delaware as the first border state which had "completely eradicated the dual system." 393 F. Supp. at 451.

1976—The three-judge Court stated: "The court takes judicial notice that in the past the State has implemented desegregation decisions in good faith." 416 F. Supp. at 365.

1978—The District Court stated: ". . . this is not a case requiring a court to devise its own plans due to a total abdication by local authorities . . . the case at this stage is not characterized by recalcitrance and obdurance . . ." (A133)

The Court of Appeals is of the view that its precedent setting holding on the question of the application of presumptions and burden of proof in determining incremental segregative effect in a multi-district setting wherein a substantial number of the alleged violations were committed by non-school authorities is supported by this Court's decisions in *Green*[36], *Swann*[37] and *Keyes*.[38] (A27-29). None of these cases dealt with the issue of incremental segregative effect and its determination. All three are single district cases involving violations committed by school authorities only.

The burden of proof imposed by the Court of Appeals was not relied upon or even mentioned by the District Court. The question of burden of proof is irrelevant in

36. *Green* did not involve the question of the extent of incremental segregative effect and did not consider the question under consideration.

37. The passage quoted by the Court of Appeals from *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971) would be applicable only after the violation and incremental segregative effect had been determined in a one district setting.

38. *Keyes* has previously been discussed, *supra*, p. 28.

this circumstance where it was admitted by the proponents of the proffered plans at trial, in the first instance, and then by the court in its opinion (A151), that the plans were developed without regard to incremental segregative effect. The burden of proof ruling of the Court of Appeals is a novel doctrine which should be reviewed before it is allowed to become a precedent for other courts to follow.

III. The Propriety of a Voluntary Plan to Remedy an Inter-District Violation in a Multi-District Case Should Be Reviewed.

The courts below and the lower courts generally on a national basis have construed this Court's decisions in numerous cases, most notably *Green v. New Kent County School Board*, 391 U. S. 430 (1968), as strongly disfavoring voluntary plans. The pertinent rulings and pronouncements of this Court on the subject have been in the context of single district cases. In most, if not all of these cases, there has been a strong showing of delay and avoidance by the school officials administering the district in question.

Inevitably, a multi-district case involves complexities not found in a single-district case. Rather than resort to the extreme type of remedy utilized in this case,[39] voluntary and magnet type plans may be more suitable than in the usual single-district school desegregation case. Different techniques may be required.

The courts below cast aside with scant consideration a legislatively enacted majority-minority voluntary transfer plan between the predominantly black districts and the predominantly white districts which was enacted by the General Assembly[40] of the State of Delaware following the

39. See, *supra*, pp. 5-6.

40. In the plan's first year of operation (1977-78), the final data shows that approximately 14% of the black students of the Wilmington School District and 26% of the black students of the pre-

submission of the case to the Court of Appeals in April of 1977 and in response to the lower court's directives to desegregate because of the courts' perceptions that this Court strongly disapproves of any voluntary program. Indeed, the Court of Appeals misunderstood the relationship between the "reverse volunteerism" plan proposed by the State Board of Education's report of July 1977 and the legislatively enacted voluntary transfer plan because of its superficial consideration of the voluntary plan. The two plans were separate and independent of each other and were not intended to "complement" each other. (A14).

The courts below indicated concern that, under the legislative voluntary transfer program, only a handful of suburban white children elected to transfer into the city schools. The courts ignored the fact that there was nothing in the record to suggest that, "but for" any or all of the suggested violations, suburban whites would have moved into the city contrary to the national pattern elsewhere. It was contended below that the composite effect of the suggested violations was to discourage city blacks from moving to the suburbs. The courts refused to recognize that the legislative program cured this problem in that it gave the city black students maximum mobility insofar as the schools were concerned and that they could choose to go to school anywhere in northern New Castle County.

We urge this Court to review this aspect of this case so as to speak on the question of the propriety of voluntary programs in a metropolitan multi-district setting.

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40. (Cont'd.)
dominantly black suburban district of DeLaWarr elected to transfer to the predominantly white district of their choice. (The figures cited by the Court of Appeals, A16, were based on preliminary data). In one of the predominantly white districts, black student enrollment increased from 3.9% in 1975 to 22% in 1977-78. Another district's black student enrollment increased from 2.7% to 16.7% during the same period of time. All of the other suburban districts had an increase in their black student enrollments.

IV. Assuming That This Court's Summary Affirmance Intended to Affirm One or More of the Eight Discrete Violations, This Court Should Re-Examine That Affirmance in the Light of Its Subsequent Decisions.

We need not review the uncertainty that has prevailed in this case since November 1975 as to what was necessarily decided by this Court's summary affirmance.

Since the date of the summary affirmance, this Court has decided a large number of cases [41] having application to school desegregation cases and which place the case at bar apart from and contrary to those cases unless this Court intended something other than the affirmance of one or more of the discrete violations.[42]

If this Court intended an affirmance of one or more of the discrete violations, petitioners respectfully urge the Court to review and reconsider its ruling in the light of its subsequent decisions. The essential element of intent is missing on the present record with respect to each of the eight discrete violations except one, i.e., the pre-*Brown* inter-district transfers [43], and findings of continuing seg-

41. *Hills v. Gautreaux*, 425 U. S. 283 (1976); *Washington v. Davis*, 426 U. S. 229 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252 (1977); *Board of School Commissioners of City of Indianapolis v. Buckley*, 429 U. S. 1068 (1977); *Austin Independent School District v. United States*, 429 U. S. 990 (1976); *Dayton School Board of Education v. Brinkman*, 433 U. S. 406 (1977); *School District of Omaha v. United States*, 433 U. S. 667 (1977); *Brennan v. Armstrong*, 433 U. S. 672 (1977).

42. At least one writer has attempted to reconcile this Court's summary affirmance with this Court's decisions in *Washington v. Davis* and *Village of Arlington Heights v. Metropolitan Housing Development* and has been unable to do so. Harrison, *Metropolitan School Desegregation: Discriminatory Intent*, 51 Temple L. Q. 41 (1978).

43. It would seem that, assuming that any inter-district violation was affirmed by this Court, only the pre-*Brown* transfers could have been affirmed since it alone was accompanied by the required intent. Assuming that these transfers were affirmed as a violation,

regative effect are absent with respect to all. A review should be extended by this Court so as to ensure that the law is applied equally in Delaware as it has been applied elsewhere in the cited cases.

This Court's summary affirmance has curtailed the consideration of important and complex issues by the lower courts. Although puzzled by the significance of the summary affirmance, the Court of Appeals has refused to review the very predicate of the remedy that has been imposed, i.e. the identification of the specific violation or violations to be redressed and the extent, if any, of the continuing segregative effect thereof. Rather, the Court of Appeals has chosen to assume that all suggested violations have been affirmed and that all racial separation in northern New Castle County is the result of these violations (A25) even though the three-judge court had conceded that demographic changes in Wilmington were caused in part by factors unrelated to constitutional violations (393 F. Supp. at 434).

There are various possible meanings of the summary affirmance which have been advanced to the courts below. The courts have felt precluded from considering such meanings, suggesting that only this Court can do so. We implore this Court to do so. Justice can be done in this case for all the people of Delaware only if the matter is clarified. Judicial order requires it so that other courts do not place an erroneous gloss on the precedential value of the case.

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43. (Cont'd.)
the trial court should have first determined whether there was any continuing segregative effect as a result of the transfers before imposing an inter-district remedy rather than an intra-district remedy, and, only if there were, would an inter-district remedy be appropriate, limited to such effect. The trial court did not so limit itself and the Court of Appeals has felt precluded from reviewing this bedrock issue.

CONCLUSION

The case at bar raises questions of national importance in the complex setting of a multi-district metropolitan school desegregation case. The courts below have broken new ground in the application of the standards of *Dayton* and the presumptions of *Keyes* and have reached results that violate this Court's rulings in those cases and the principles that underlie those rulings. They have applied the law of the case principle so as to deprive petitioners of their right to a full and thorough appellate review of the central issues of this litigation. The case involves an unprecedented remedy which violates the sanctity of local democratically created political entities and intrudes unnecessarily upon state and local political processes.

For these reasons, and the reasons set forth herein, we respectfully pray that this Court grant the petition for certiorari and reverse the judgment below.

Respectfully submitted,

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A1-A245

APPENDIX.

We adopt and incorporate by reference the Appendix to the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit filed concurrently herewith by the Delaware State Board of Education.